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No. _____ (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

KENNY ALSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES E. FELMAN
KATHERINE EARLE YANES
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
(813) 229-1118

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether Petitioner made a substantial showing of the denial of a constitutional right by establishing he was deprived of his constitutional rights against double jeopardy and to the effective assistance of counsel because his counsel failed to clarify that Petitioner was not seeking a mistrial and/or failed to ensure that the record reflected that Petitioner did not seek a mistrial when the district court *sua sponte* ordered a mistrial?

II. Whether Petitioner made a substantial showing of the denial of a constitutional right by establishing he was denied his constitutional right to the effective assistance of counsel because his counsel failed to object to the proposed inclusion of an "aggravating role" enhancement when the government had agreed to recommend that Petitioner be sentenced without any role adjustment?

III. Whether Petitioner made a substantial showing of the denial of a constitutional right by establishing that he was deprived of his constitutional rights to due process and the effective assistance of counsel because his counsel failed to adequately explain to the court the facts relating to Petitioner's entitlement to a *Kastigar* hearing and failed to correctly state the applicable law relating to the *Kastigar* issue, with the result that the government was not required to meet its burden of proof under *Kastigar*, and because his counsel failed to appeal the denial of an adequate *Kastigar* hearing?

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IV. Whether Petitioner made a substantial showing of the denial of a constitutional right by establishing that he was denied his constitutional right to the effective assistance of counsel because his counsel failed to impeach a critical government witness with available evidence?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenny Alston respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for a Certificate of Appealability is unpublished and appears at Appendix A. The Report and Recommendation of a Magistrate Judge of the United States District Court for the Southern District of Florida recommending that the district court deny Petitioner's motion under 28 U.S.C. Section 2255 is unpublished and appears at Appendix B. The Order of the United States District Court for the Southern District of Florida adopting the Report and Recommendation of the Magistrate Judge and denying the Petitioner's motion under 28 U.S.C. Section 2255 is unpublished and appears at Appendix C. The opinion of the United States District Court for the Southern District of Florida denying both Petitioner's motion for reconsideration and his request for a certificate of appealability is unpublished and appears at Appendix D. The opinion of the United States Court of Appeals for the Eleventh Circuit on direct appeal is unpublished and appears at Appendix E.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion October 16, 2007. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be . . . subject for the same offense to be twice put in jeopardy . . . nor be deprived of life, liberty or property without due process of law." The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

In pertinent part, 28 U.S.C. Section 2253(c) provides that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> . . . .
>
> (B) the final order in a proceeding under section 2255.

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The relevant portion of 28 U.S.C. Section 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released on the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside, or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be promptly served upon the United States attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

Petitioner Kenny Alston was denied a Certificate of Appealability ("COA") following the district court's denial of his federal habeas petition without an evidentiary hearing. As a result, the district court's ruling has never been reviewed on the merits, even though Alston's petition raised four substantial issues involving the denial of his constitutional rights to the effective assistance of counsel, to due process, and against double jeopardy.

I. Alston's 2255 Petition

Alston invoked the jurisdiction of the United States District Court for the Southern District of Florida under 28 U.S.C. Section 2255 by filing a Petition to vacate his drug conspiracy conviction and life sentence ("2255 Petition"). The 2255 Petition asserted that: (1) Alston was deprived of his constitutional rights against double jeopardy and to the effective assistance of counsel because his counsel failed to clarify that Alston was not seeking a mistrial and/or failed to ensure that the record reflected that Alston did not seek a mistrial when the district court *sua sponte* ordered one; (2) Alston was denied his constitutional right to the effective assistance of counsel because his counsel failed to object to the proposed inclusion of an "aggravating role" sentencing enhancement, when the government had agreed that Alston should be sentenced without any role adjustment; (3) Alston was deprived of his constitutional

rights to due process and the effective assistance of counsel because Alston's counsel failed to accurately convey the relevant facts and applicable law relating to Alston's entitlement to a *Kastigar*[1] hearing, the government was not required to meet its burden of proof under *Kastigar*, and Alston's counsel failed to appeal the denial of an adequate *Kastigar* hearing; and (4) Alston was denied his constitutional right to the effective assistance of counsel because his counsel failed to impeach a critical government witness with available evidence. App. 10.[2] The facts relating to each of these grounds are set forth in turn below.

A. Facts relating to Ground One

1. The government causes a mistrial

Alston was first tried on August 7-10, 2000, on a first superceding indictment charging possession with intent to distribute crack cocaine. App. 3. Alston was represented at that trial by Mitchell R. Denker, Esquire.

The August 2000 trial mistried on its fourth day following numerous sustained objections to the government's discovery violations and arguments and elicitation of evidence suggesting Alston was involved

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[1] *United States v. Kastigar*, 406 U.S. 441 (1972).

[2] The Appendix will be cited as "App. __ ." The record on appeal to the Eleventh Circuit includes entries on the criminal case docket, which will be cited as "Doc. __," and entries on the civil 2255 case docket, which will be cited as "CV-Doc. __."

in crimes beyond the scope of the indictment. App. 11; Doc. 103 at 43, 130, 144; Doc. 104 at 124; Doc. 105 at 18. On the second trial day, Alston moved for a mistrial because the government elicited uncharged crime evidence that had not been disclosed in discovery. App. 11. The district court reserved ruling on the mistrial motion. App. 12. At the end of the third trial day, an additional discovery violation initially prompted Alston's attorney to move for a mistrial, but he then indicated he would "think about it overnight." App. 12. The district court warned the government that any more discovery violations would result in a mistrial. Doc. 104 at 142.

Having told the district court he would think overnight about whether to seek a mistrial, Doc. 104 at 133, Alston's counsel did not request one the next day, the fourth trial day. With its first witness of the day, the government again inquired about alleged uncharged crimes evidence not timely disclosed in discovery. App. 12. Denker objected to the government's question, Doc. 105 at 18, but did not request a mistrial. The district court nonetheless indicated that "I think we could and should consider this at least the third motion for mistrial. . . . So I am going to grant the motion for mistrial and discharge the jury." Doc. 105 at 34. The transcript does not reflect that Denker objected to the district court's statement it would treat the objection as a motion for a mistrial.

2. Alston raises the double jeopardy issue

Prior to Alston's retrial, he moved for dismissal on double jeopardy grounds. App. 4. The motion asserted that "a retrial is barred and the indictment should be dismissed" because "[w]ithout a request from defense counsel, no manifest necessity existed for the mistrial." Doc. 101 at 7. The district court ruled that it had not granted the motion for mistrial *sua sponte*, but based on Alston's earlier motion for a mistrial. Doc. 118 at 2-3. It noted that Alston did not object to the mistrial, and held that Alston's retrial was therefore not barred on double jeopardy grounds. Doc. 118 at 3-4.

Alston's conviction was affirmed on direct appeal. App. 42. The Court of Appeals rejected Alston's double jeopardy argument on the theory Alston consented to the mistrial by not objecting to it. App. 39.

3. Denker's affidavit

In connection with Alston's 2255 Petition, Denker provided an affidavit. He attested that at the point a mistrial was ordered, he and Alston believed the trial was going well and neither he nor Alston then wanted a mistrial. Doc. 311 Ex. D. ¶ 8. Denker also believes that when the district court said it would grant a mistrial, he indicated that there were alternatives to a mistrial. *Id.* ¶ 9. Denker stated that if he "failed to clarify that Mr. Alston was not seeking a mistrial or failed to ensure that the record reflected that Mr.

Alston did not want a mistrial, that omission was a mistake on [his] part." *Id.* ¶ 10.

B. Facts relating to Ground Two

In June 2001, Alston pled guilty to a third superseding indictment. App. 4. The plea agreement provided that there would be "no role enhancements" and the government would "not seek [a 21 U.S.C. Section] 851 enhancement." App. 15-16. Alston was represented at his change of plea and subsequent proceedings by Alvin Entin, Esquire.

The Presentence Investigation Report recommended a four-level aggravating role enhancement pursuant to United States Sentencing Guidelines Section 3B1.1(a). App. 16. That enhancement resulted in a total offense level of 36 and a sentencing range of 324-405 months at Alston's criminal history category. App. 16. Without the role enhancement, Alston's guideline range would have been 292-365 months. App. 16. Alston's counsel did not object to the four-level role enhancement. Instead, Entin moved for a downward departure on the theory that the "intent" of the plea negotiations had been that Alston would be facing a sentence in the range of fifteen years. App. 16-17.

The district court, concerned that Alston had not understood the sentencing range he faced when he pled, ordered that Alston would be allowed to move to withdraw the plea. App. 18. Alston's motion to withdraw his plea was granted. App. 18.

Alston then went to trial and was convicted. The withdrawal of Alston's plea relieved the government of its agreement not to seek a Section 851 enhancement, and it did so. As a result, the district court was required to impose a mandatory minimum sentence of life in prison. Entin's failure to object to the role enhancement thus deprived Alston of the benefit of his bargain with the government as to both the role enhancement and the avoidance of a mandatory minimum life sentence.

C. Facts relating to Ground Three

Following Alston's entry of a guilty plea, Alston cooperated with the government and was debriefed extensively. Alston met with the government on at least six occasions. App. 19. At his first debriefing, he provided the government a legal pad "full of notes." Doc. 235 at 14. After Alston withdrew his plea, he went to trial on March 31-April 3, 2003. Prior to trial, Alston filed a motion for a hearing pursuant to *United States v. Kastigar*, 406 U.S. 441 (1972), in which it could be determined whether the evidence the government proposed to use against Alston was tainted by the use or derivative use of statements Alston made in the course of his cooperation with the government. Doc. 204.

The *Kastigar* hearing was held on the morning of the first day of trial. At that hearing, Alston's counsel failed to explain critical facts to the district court. A different judge presided over the March 2003 trial

than had heard the prior proceedings. That judge asked whether the fact Alston has "already been to trial at least once before there was any debriefing" wasn't "evidence in and of itself [of the] independent or non-derivative nature of their evidence." Doc. 235 at 9. In fact, there were significant changes in the government's theory and evidence between the two trials, including the charges at issue, the scope and dates of the alleged offenses, the quantities of narcotics allegedly involved, and the identity of the government's witnesses. Doc. 311 at 15. Entin not only failed to correct the court's misimpression that the prior trial established that the government's evidence was non-derivative, but also inaccurately stated that it should not be difficult for the government to establish an independent source for its evidence "because they have tried the basic part of this case once before."[3] Doc. 235 at 8.

Entin also misstated the law at the *Kastigar* hearing. Although he correctly recited that the burden is "on the government to establish the independent source of all of its evidence," he went on to state that the Eleventh Circuit has not held that *Kastigar* protections apply "under a Rule 11 plea colloquy." Doc. 235 at 7-8. To the contrary, the Eleventh Circuit, like the other Courts of Appeal, has long required *Kastigar* protection where a defendant has made immunized statements in the course of cooperating

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[3] Entin did not represent Alston at the prior trial.

with the government pursuant to a plea agreement. *See United States v. Harvey*, 869 F.2d 1439, 1443-45 (11th Cir. 1989). Under the *Kastigar* rule, when a defendant shows he has made statements to the government pursuant to a grant of use immunity, "the burden shifts to the prosecution which then has 'the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent' of the testimony given under the grant of immunity." *Id.* at 1445 (quoting *Kastigar*, 406 U.S. at 460).

Having been told – incorrectly – by Entin that the Eleventh Circuit does not require the government to make a *Kastigar* showing in plea cases, the district court did not require the government to establish an independent, legitimate source for its evidence. The district court instead pressed Entin to identify potentially tainted witnesses, then accepted the prosecutor's unsworn proffer that the government had independent sources for those witnesses.[4] Doc. 235 at 9-18.

Finally, Entin failed to raise the *Kastigar* issue on appeal.

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[4] Because the prosecutor who made that proffer was new to Alston's case, he may not even have known the source of all of the government's evidence.

D. Facts relating to Ground Four

Alston was tried along with co-defendant Jermaine Mathis from March 31-April 3, 2003. App. 22-23. Alston and Mathis were charged with conspiring to possess with intent to distribute cocaine and crack cocaine. The government's theory at trial was that Alston, Mathis, and others used a trailer located at C9 Ninth Avenue, on Stock Island – referred to at trial as "C9" – to "cook" crack cocaine and to store and distribute cocaine and crack cocaine. App. 23.

No law enforcement witness connected Alston to any drug transactions. Although the investigation that led law enforcement to the C9 trailer was part of a lengthy and extensive Drug Enforcement Administration ("DEA") surveillance operation, the government had no audiotapes, videotapes, or photographs of Alston engaged in a drug transaction, and the surveillance team never observed Alston at the C9 trailer. Doc 235 at 78-79, 87, 113-14.

The government's key witness against Alston was a cooperating witness, Charles Lightburn. Lightburn claimed he had sold drugs for Alston and had sometimes obtained those drugs at the C9 trailer on Stock Island. Doc. 236 at 180, 183-85.

During Lightburn's testimony, the government played audiotapes of several conversations between Lightburn and a confidential source relating to drug sales. Doc. 236 at 195-98. One of these was a recording from July 18, 1999, in which Lightburn tells the confidential source to call him back in thirty

minutes "cause I gotta go to Stock Island then, you know, grab that shit," then calls the confidential source to say he wouldn't be able to obtain anything until the next day. App. 23-24. Lightburn testified at trial that he was referring on the tape to going to Stock Island to get drugs from Alston. Doc. 236 at 196.

There was available evidence that called into question Lightburn's testimony that his reference to "Stock Island" meant obtaining drugs from Alston. A DEA report turned over in discovery – but not introduced at trial – shows that one day after Lightburn told the confidential source he would obtain drugs from Stock Island the next day, he was driven to his meeting with the confidential source in a car registered to a known drug dealer, James Leland, at an address on Stock Island. App. 24. At that July 19 meeting, Lightburn sold the confidential source a quantity of crack cocaine. App. 24.

Alston informed Entin that Leland was a known drug dealer Lightburn associated with who lived on Stock Island, and the address for Leland reflected on the DEA report is a Stock Island address. Doc. 311 at 20. Entin therefore had evidence available to him tending to show that one day after Lightburn promised to get drugs from "Stock Island" and deliver them the following day, Lightburn was driven to the meeting at which he consummated that sale by a known drug dealer who lived on Stock Island. App. 24. Entin made no use of that evidence.

Lightburn's testimony implicating Alston as his source for cocaine was otherwise significantly impeached. It was inconsistent with his testimony before at least two different federal grand juries implicating a different individual as his source for cocaine. Doc. 236 at 215-16; Doc. 237 at 34, 37. After being confronted with that prior inconsistent testimony, Lightburn admitted he had committed perjury. Doc. 237 at 34-35.

The prosecutor conceded in closing that Lightburn's testimony was "troubling" because "he did move around," but argued that the taped conversations involving Lightburn corroborated Lightburn's testimony that Alston was his supplier. Doc. 237 at 150-52. The prosecutor played the tape in which Lightburn refers to Stock Island during his rebuttal closing and concluded his argument by asking the jury to "think about those tapes." Doc. 237 at 175-76, 179.

II. The denial of Alston's 2255 Petition without an evidentiary hearing

No evidentiary hearing was held on Alston's 2255 Petition. The Magistrate Judge issued a Report and Recommendation recommending that the 2255 Petition be denied in its entirety. App. 2-26. Alston objected to the Magistrate Judge's Report and Recommendation. App. 28. The district court adopted the Report and Recommendation and denied Alston's 2255 Petition. App. 28.

Alston moved for rehearing, arguing that his Petition asserted issues of disputed fact that could not properly be decided without an evidentiary hearing. App. 31. The district court denied Alston's motion for reconsideration, stating that "[a]fter review of the record, the Court finds that the motion files, and records of this case conclusively show that the prisoner is entitled to no relief." App. 31.

III. The denial of a Certificate of Appealability

The district court denied Alston's request for a certificate of appealability, stating that "[a]fter a review of the record, the Court finds that Petitioner has not raised an issue regarding the denial of a constitutional right which could be debatable among reasonable jurists, or is otherwise reasonably adequate to warrant further proceedings." App. 30-31. Alston moved in the Eleventh Circuit for a Certificate of Appealability. The Eleventh Circuit denied his motion, stating "Appellant's motion for certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right." App. 1.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari should be granted. The Eleventh Circuit's decision conflicts with this Court's opinion in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), because it denied Alston a

Certificate of Appealability ("COA") even though he made a substantial showing of the denial of a constitutional right as to four issues, and reasonable jurists would find the denial of Alston's claims debatable or wrong. Moreover, the questions presented are of great importance because the COA requirement has left Alston without any legal remedy for these multiple significant deprivations of his constitutional rights.

I. The Eleventh Circuit's Decision Conflicts With *Miller-El v. Cockrell*.

The Eleventh Circuit's refusal to grant Alston a COA conflicts with *Miller-El*. As set forth in that opinion, a COA should issue if "the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot v. Estelle*, 463 U.S. 880 (1983)). The "COA determination . . . requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of" a COA applicant's habeas claims, and issuance of a "COA does not require a showing that the appeal will succeed." *Id.* at 336, 337. Accordingly, a request for a COA should not be denied merely because the court "believes the applicant will not demonstrate an entitlement to relief." *Id.* Instead, a COA should issue where "reasonable jurists would find the district court's assessment of the constitutional claims was debatable or wrong." *Id.* at 338.

In this case, Alston asserted four grounds on which he was deprived his constitutional rights to effective assistance of counsel, to due process, and against double jeopardy. He made a substantial showing of the denial of these constitutional rights and the district court's denial of his 2255 Petition is a decision that reasonable jurists would find debatable or wrong. The denial of a COA was therefore inconsistent with the rule this Court stated in *Miller-El.*

A. Alston made a substantial showing he was denied constitutional rights by his counsel's failure to clarify that Alston was not seeking a mistrial and to ensure that the record reflected Alston did not seek a mistrial when the district court *sua sponte* ordered one.

Alston made a substantial showing he was denied his constitutional rights against double jeopardy and to the effective assistance of counsel because at the first, mistried trial of his case, his counsel failed to clarify that Alston was not seeking a mistrial, and/or failed to ensure that the record reflected that Alston did not seek a mistrial, when the district court *sua sponte* ordered one. Doc. 311 at 4-11. It was his counsel's unrebutted sworn testimony that by the time a mistrial was ordered on the fourth trial day, he and Alston believed the trial was going well and they did not want a mistrial. *See id.* Ex. D ¶ 8. Counsel additionally attested to his belief that when the court

indicated it would order a mistrial, he stated that there were alternatives to granting a mistrial, which statement was not reflected in the transcript. *Id.* ¶ 9.

1. The failure to clarify that Alston was not seeking a mistrial and to ensure that the record reflected Alston did not seek one was deficient performance.

The Magistrate Judge's finding, adopted by the district court, was that "a reasonable attorney would most likely not have objected to a mistrial, given that one had already been requested and the possibility of prejudice to the defendant because of the government's multiple discovery violations." App. 13. Reasonable jurists would conclude that this finding was debatable or wrong for at least two reasons.

First, it misapprehends the alleged deficiency. Alston did not contend Denker was ineffective for acquiescing to a mistrial; to the contrary, the unrebutted record evidence is that Denker did not acquiesce in the mistrial. Denker's affidavit reflects that he did not request and did not want a mistrial at the time one was granted, that he and Alston believed the trial was going well and that the defense had a significant chance of prevailing, and that he indicated to the court that there were alternatives to a mistrial. Doc. 311 Ex. D. The issue here is thus not whether a reasonable lawyer would have agreed to a mistrial, but whether, having determined that a mistrial was

not in his client's interest, a reasonable lawyer would fail to make a record of his objection to one. Trial counsel who fails to preserve an otherwise meritorious issue performs deficiently. *See Davis v. Secretary for Dep't of Corr.*, 341 F.3d 1310, 1314 (11th Cir. 2003).

Second, this finding ignores the significant record support for Denker's determination that a mistrial was not in Alston's interest. While, as the Magistrate Judge noted, Alston had previously requested a mistrial, the Magistrate Judge did not address what took place after that motion was made. Alston moved for mistrial on the second trial day. *See* Doc. 311 at 7. At the hearing on that motion the following morning (the third trial day), the court ruled that the evidence the government wished to introduce tying Alston to an alleged broad conspiracy was "totally irrelevant." *Id.* At the same hearing, the court expressed doubts as to whether the government would survive a dismissal motion without that evidence. *Id.* at 7-8. Following an additional discovery violation at the end of the third trial day, Denker initially moved for a mistrial, but then reversed himself, stating he would "think about it overnight." *Id.* at 8. Denker in fact did not request a mistrial the following morning (the fourth trial day). *Id.* at 9. Although Denker objected later that trial day to another discovery violation by the government, he did *not* move for a mistrial at that time. *Id.* Instead, the court *sua sponte* decided to treat the objection as a motion for mistrial and grant the motion. *Id.*

Denker reasonably determined, with Alston's agreement, that a mistrial was not in Alston's interests and should not be requested. His failure to clarify that the defense did not want a mistrial when the district court announced *sua sponte* that it would grant one was deficient performance.

2. The failure to clarify that Alston was not seeking a mistrial and to ensure that the record reflected Alston did not seek a mistrial prejudiced Alston.

Reasonable jurists would likewise conclude that the determination Alston was not prejudiced by Denker's error is debatable or wrong. Alston raised the double jeopardy issue resulting from his retrial both in the subsequent district court proceedings and on appeal to the Eleventh Circuit. Both the district and appellate courts ruled against Alston on the ground that his counsel's failure to object to the mistrial meant his retrial was not barred by double jeopardy.

The Magistrate Judge held Alston was not prejudiced by his counsel's error on the theory that double jeopardy would not have barred his conviction because he was charged in the mistried trial with substantive possession counts and in the later trial with conspiracy. App. 13-14. This theory does not take into account the series of events that would have occurred had Denker not performed deficiently, i.e., if

he had made it clear to the district court that Alston did not seek a mistrial. If the district court then refrained from ordering a mistrial, the trial would have proceeded to one of two outcomes. One, Alston could have been convicted, in which case he would have been sentenced for a small quantity of cocaine that would not have triggered the mandatory minimum sentence that resulted from Alston's ultimate conviction on the later indictment. There is a reasonable probability that in that event the government would not have chosen to subsequently indict Alston on a conspiracy charge.[5] Two, Alston could have been acquitted, either by the jury or by order of the court. Whether or not a subsequent indictment of Alston on conspiracy charges would have been barred by double jeopardy, such an indictment would be vulnerable on due process grounds, *see Blackledge v. Perry*, 417 U.S. 21, 25-29 (1974), particularly in light of the government's actions at the first trial.

The alternative scenario assumed by the Magistrate is that Denker would have clarified that he did not seek a mistrial, but that the district court would have granted one anyway over Alston's objection, and

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[5] Moreover, the question of whether the government would have re-indicted Alston for conspiracy following a conviction on a substantive charge is a factual question – one of many factual questions implicitly decided in denying Alston's 2255 Petition. A hearing is required before a district court may decide "a disputed issue of fact concerning a petitioner's entitlement to relief." *Solis v. United States*, 252 F.3d 289, 294 (3d Cir. 2001); *see also United States v. White*, 366 F.3d 291, 297 (4th Cir. 2004).

the district court having taken that unlikely step, the government would have re-indicted Alston on conspiracy charges. Again under that scenario, the government would be required to show its decision to do so was not a vindictive one in violation of due process. *See Blackledge*, 416 U.S. at 25-29. That showing would be particularly difficult because Alston had a strong argument the government deliberately provoked a mistrial in the first trial. Under each of the possible alternative series of events, then, there is a reasonable probability of a different outcome.[6]

Reasonable jurists would therefore conclude that the determination that counsel's failure to clarify that Alston did not seek a mistrial or to ensure that the record reflected that Alston did not want a mistrial was not ineffective assistance of counsel was debatable or wrong.

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[6] The Magistrate Judge did not consider Alston's argument that a re-indictment would have been vulnerable on due process grounds on the theory this argument was "outside the permissible scope of a Reply." App. 15. Alston's argument was directly in answer to the prejudice argument the government raised for the first time in the history of this case in its response to Alston's 2255 Petition. Moreover, prior to the district court's adoption of the Report and Recommendation, the government had the opportunity to respond to Alston's Objections, including Alston's arguments as to this issue.

B. Alston made a substantial showing he was denied constitutional rights by his counsel's failure to object to a role enhancement the government agreed did not apply.

Alston made a substantial showing that he was denied his constitutional right to the effective assistance of counsel when his counsel failed to object to the proposed inclusion of an "aggravating role" enhancement. Doc. 311 at 11-13. The government had agreed to recommend to the district court that Alston be sentenced "with no role enhancements." Doc. 194 at 3. Alston's counsel nonetheless failed at sentencing to object to the application of a four-level role enhancement.

Reasonable jurists would conclude that the finding that Alston's counsel did not perform deficiently by failing to object to the four-level role enhancement was debatable or wrong. The Magistrate Judge offered no explanation or analysis as to how failing to object to a role enhancement the government had agreed should not be applied was not deficient performance. App. 19. Had the government put on evidence to support the aggravating role enhancement, its doing so would have violated the plea agreement. The government's factual stipulation in a plea agreement "obligates the government to strict compliance." *United States v. Boatner*, 966 F.2d 1575, 1578 (11th Cir. 1992); *see also United States v. Taylor*, 77 F.3d 368, 370-71 (11th Cir. 1996) (government's taking position contrary to plea agreement

breached plea agreement). In any event, Alston had a meritorious basis on which to object to the role enhancement even without the government's agreement. The record in this case does not establish that Alston exercised the requisite control over his alleged co-conspirators to be eligible for the proposed role enhancement. *See* CV-Doc. 14 at 4.

Further, the failure to object to the aggravating role enhancement prejudiced Alston. Alston's guideline range with the proposed aggravating role enhancement was 324-405 months and without the proposed enhancement was 292-365 months. App. 16. While the basis for the finding of no prejudice is not clear from the Report and Recommendation, it appears that the Magistrate agreed with the government's argument that even if his counsel had successfully objected to the proposed role enhancement, Alston would still have withdrawn his plea and gone to trial.[7] *See* App. 18-19. The notion that there is no reasonable probability Alston would have gone forward with his plea rather than risking a mandatory minimum life sentence even if his counsel had successfully objected to the proposed enhancement is contradicted by record in this case. The role enhancement made a difference of several years in the

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[7] The question of whether Alston would have withdrawn his plea had his counsel successfully objected to the role enhancement is another example of a disputed issue of fact that should not have been decided by the district court without an evidentiary hearing. *White*, 366 F.3d at 297; *Solis*, 252 F.3d at 294.

potential guidelines sentence Alston faced. Alston was extremely reluctant to withdraw his plea and ultimately did so only because the sentence he faced was "twice as much as what he was told at the time he entered the plea." *See* Doc. 323 at 8. There is at the very least a reasonable possibility that but for his counsel's deficient performance Alston would have been sentenced within the guidelines rather than received the mandatory minimum life sentence ultimately imposed.

Accordingly, reasonable jurists would find that the district court's determination that Alston did not receive ineffective assistance of counsel when his attorney failed to object to the application of an aggravating role agreement the government had agreed should not be applied is debatable or wrong.

C. Alston made a substantial showing he was denied constitutional rights by his counsel's failure to adequately explain the facts relating to Alston's entitlement to a *Kastigar* hearing, to correctly state the applicable law relating to the *Kastigar* issue, or to appeal the denial of an adequate *Kastigar* hearing.

Alston made a substantial showing he was denied his constitutional rights to due process and the effective assistance of counsel because: (1) his counsel failed to adequately explain to the district court the facts relating to Alston's right to a *Kastigar* hearing; (2) his counsel failed to correctly state the applicable

law relating to the *Kastigar* issue, (3) the government was never required to meet its burden of proof that its evidence was derived from an independent source, and (4) his counsel failed to appeal the denial of an adequate *Kastigar* hearing. Doc. 311 at 13-17. Following his plea, Alston cooperated extensively with the government. At the outset of Alston's subsequent trial, Entin failed to ensure that an adequate *Kastigar* hearing took place, misstating to the court both the relevant facts and the applicable law. Entin also failed to appeal the denial of an adequate *Kastigar* hearing.

1. The failure to ensure an adequate *Kastigar* hearing was deficient performance.

Alston's counsel performed deficiently by misstating the facts and law to the trial court, with the result that the government was not required to satisfy its burden under *Kastigar*. When a defendant who has cooperated with the government, as Alston did, is tried, the government bears "the heavy burden of showing that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, 406 U.S. at 461-62. While Alston's counsel moved for a *Kastigar* hearing at the outset of Alston's trial, he misadvised the district court as to the facts relating to the legitimate independent nature of the government's evidence. The district court was under the misimpression that the fact Alston had had a prior trial (in front of another judge) before he began

to cooperate with the government showed that the government's evidence was "independent or non-derivative." Doc. 235 at 9. In fact, however, there was very little overlap in the evidence between the two trials. Entin did not correct the district court's false impression and affirmatively misinformed the court that it should not be difficult for the government to establish an independent source for its evidence "because they have tried the basic part of this case once before." Doc. 235 at 8.

Entin also misstated the applicable law to the district court, indicating that the Eleventh Circuit has not ruled *Kastigar* applies where a defendant has cooperated pursuant to a plea agreement. Doc. 235 at 8. The opposite is true. *See Harvey*, 869 F.2d at 1443-45.

The Magistrate Judge found trial counsel did not perform deficiently on the ground that "the Court considered Alston's arguments at the *Kastigar* hearing before trial." App. 22. The Magistrate Judge misapprehended the *Kastigar* issue raised in Alston's 2255 Petition. Alston did not claim that there was no *Kastigar* hearing. The issue is that, due to his counsel's failure to explain the facts and law to the district court, that hearing was not adequate to satisfy the constitutional requirements imposed by *Kastigar*. In that regard, Alston made a substantial showing of the denial of his constitutional rights.

2. The failure to ensure an adequate *Kastigar* hearing prejudiced Alston.

With Entin having failed to correctly state the facts or the law, the *Kastigar* hearing that took place failed to satisfy the requirements of the Constitution. The government was not required to show an independent source for its evidence against Alston, as *Kastigar* requires. A mere unsworn proffer by the prosecutor, all the government offered here, is not sufficient to satisfy *Kastigar*. *See United States v. Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985) ("mere denials of use by the prosecutors . . . are generally insufficient to meet the government's burden, even if made in good faith"). "[T]he government's burden in not limited to such 'negation of taint'; rather, the government must go further and affirmatively prove legitimate independent sources for its evidence and affirmatively establish that none of [its] evidence . . . was derived directly or indirectly from the immunized testimony." *Id.* at 1485-86. "To establish a 'wholly independent source,' the government must demonstrate that each step of the investigative chain through which the evidence was obtained is untainted." *United States v. Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994).

The necessary first step in a *Kastigar* proceeding has never occurred here: the government's proof of the substance of Alston's immunized statements. At the time of the district court's consideration of the *Kastigar* issue, the government was not able to produce the legal pad full of notes Alston turned over to

them or records detailing what information Alston provided at several of his multiple interviews by the government. Doc. 235 at 12-14. "[A] district court conducting a *Kastigar* hearing ***must*** have the defendant's immunized statements in order to decide the issue fairly." *United States v. Cantu*, 185 F.3d 298, 303 (5th Cir. 1999) (emphasis added). "Because the burden of disproving taint is allocated to the government, the lack of evidence" on this point leads to a finding of taint. *United States v. Schmidgall*, 25 F.3d 1533, 1538 (11th Cir. 1994).

The Magistrate Judge's *Kastigar* analysis focused on two witnesses Entin identified, at the district court's urging, at the *Kastigar* hearing as potentially being tainted because they were not listed as witnesses at Alston's first trial. App. 21-22; Doc. 235 at 9-16. Even as to those two witnesses, the government did not satisfy its *Kastigar* burden. *See* CV-Doc. 14 at 8. More importantly, the *Kastigar* inquiry could not properly be limited to witnesses Alston could show were tainted. "[T]he defendant is not required to present evidence that the [government witnesses'] testimony was tainted." *Schmidgall*, 25 F.3d at 1530. Instead, it is the government's burden to prove it has an independent source for *all* of the evidence it proposes to use against a previously immunized defendant. *Kastigar*, 406 U.S. at 460. Moreover, the fact that some witnesses had been identified prior to Alston's cooperation is not sufficient to satisfy *Kastigar*. As well as proving that Alston's immunized statements did not lead to its discovery of witnesses,

the government should have been required to show that information it learned from Alston did not shape its questioning of any of its witnesses, including witnesses it was already aware of. *Schmidgall*, 25 F.3d at 1528 (government cannot use "immunized testimony to help shape the questioning of another witness"); *see also United States v. Hylton*, 294 F.3d 130, 134 (D.C. Cir. 2002) (issue at *Kastigar* hearing is whether witnesses were "influenced by the immunized testimony").

In sum, Alston never received an adequate *Kastigar* hearing due to his counsel's failure to provide the court with the relevant facts or to accurately state the applicable law. Reasonable jurists would conclude that the district court's determination that trial counsel's conduct was not deficient and did not prejudice Alston is debatable or wrong.

3. The failure to appeal the denial of an adequate *Kastigar* hearing was ineffective assistance of appellate counsel.

Neither the Magistrate Judge nor the district court addressed the issue of Entin's failure to raise the *Kastigar* issue on appeal. Appellate counsel's failure to raise an error is deficient if the issue is "so obviously valid that any competent lawyer would have raised it." *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001). As discussed above, the denial of an adequate *Kastigar* hearing was a clear-cut constitutional violation

based on governing United States Supreme Court and Eleventh Circuit precedent. The error was apparent from the trial record. The *Kastigar* issue was clearly stronger than the issues Entin raised on appeal.[8] *See Brown v. United States*, 167 F.3d 109, 111 (2d Cir. 1999) (appellate counsel was ineffective where the "obvious error" counsel failed to raise "plainly provided a stronger appellate issue" that the issues raised on appeal). Appellate counsel's failure to raise the issue on appeal was therefore unreasonable.

Alston was also prejudiced by his counsel's failure to raise the *Kastigar* issue on appeal. Prejudice resulting from appellate counsel's error is established if there is a "reasonable probability that the outcome

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[8] Alston raised three grounds on appeal:

(1) Whether the district court's denial of Alston's motion for dismissal on grounds of double jeopardy was error;

(2) Whether the district court's denial of Alston's motion for severance from his co-defendant, Jermaine Mathis, was error; and

(3) Whether the district court erred by failing to determine the object of the conspiracy for purposes of sentencing.

As discussed above, the Eleventh Circuit ruled that the first of these issues was unpreserved. Doc. App. 39. As to the second issue, the Eleventh Circuit rejected Alston's argument that he and his co-defendant presented conflicting defenses, pointing out that "Alston did not present a defense." App. 40. The third issue was also unpreserved and, because Alston was subject to a mandatory minimum life sentence, made no difference in the outcome of Alston's sentencing. App. 42.

of the appeal would be different" but for the error. *Clark v. Crosby*, 335 F.3d 1303, 1312 n.9 (11th Cir. 2003). The *Kastigar* issue is a meritorious appellate issue. If Alston had prevailed on this issue on appeal, the result would have been either a remand at which an evidentiary hearing could be held on the *Kastigar* issue, *see Schmidgall*, 25 F.3d at 1530-32, or an outright reversal of Alston's conviction, *see Hampton*, 775 F.2d at 1491.

Given the failure of the Report and Recommendation or the district court's order to address the ineffective assistance of appellate counsel claim, there is no explanation in the record of why the claim was denied. For the reasons discussed above, a reasonable jurist reviewing the issue would be convinced that the decision to deny the claim was debatable or wrong.

D. Alston made a substantial showing he was denied constitutional rights by his counsel's failure to impeach a critical government witness with available evidence.

Alston made a substantial showing he was denied his constitutional right to effective counsel due to his counsel's failure to impeach Lightburn, a critical government witness, with available evidence. Doc. 311 at 17-22. Materials turned over in discovery undermined Lightburn's testimony that his taped references to going to Stock Island get to drugs referred

to obtaining drugs from Alston. They tended to show that the day Lightburn said he would obtain drugs from Stock Island, he was accompanied to the planned transaction by a known drug dealer who lived on Stock Island. Doc. 311 at 20 & Ex. G. Alston's trial counsel made no use of those materials.

Entin's failure to impeach the government's key witness with this available evidence was deficient performance. The Report and Recommendation, adopted by the district court, contains no explanation for its finding that Alston's counsel did not perform deficiently by failing to impeach Lightburn with the available evidence.[9] App. 25. Failing to pursue "an important avenue of impeachment as to the [government's] star witness" is recognized to constitute deficient performance. *Cargle v. Mullin*, 317 F.3d 1196, 1215 (10th Cir. 2003); *see also Reynoso v. Giurbino*, 462 F.3d 1099, 1110-15 (9th Cir. 2006); *Driscoll v. Delo*, 71 F.3d 701, 709-10 (8th Cir. 1996). Moreover, to the extent Entin's failure to impeach Lightburn with this obviously relevant evidence was the result of his failure to thoroughly review the discovery materials, "an attorney rather clearly has a duty to familiarize himself with the discovery materials provided by the [government]." *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995). There is no reasonable explanation for failing to impeach the

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[9] The government never claimed that the failure to impeach Lightburn with the available evidence was not deficient, focusing its arguments on prejudice.

government's key witness with this significant evidence.

Moreover, trial counsel's failure to impeach Lightburn with the available evidence prejudiced Alston. The Magistrate Judge found that Alston was not prejudiced by his counsel's failure to impeach Lightburn with this evidence, referring to the government's argument that there was "sufficient testimony by other witnesses" to establish Alston's guilt. App. 25. The issue as to a habeas claim, however, is not the sufficiency of the evidence, but whether there is a reasonable probability that there would have been a different outcome had counsel performed adequately. *Strickland*, 466 U.S. at 694. Such a reasonable probability exists here, because the evidence of Alston's guilt was far from overwhelming and Lightburn was the government's key witness against him. *See* Doc. 311 at 18-19.

The Magistrate Judge also noted that Lightburn's testimony was otherwise significantly impeached. App. 24. Given Lightburn's role as the central witness against Alston, the fact that he was otherwise significantly impeached increases the prejudice to Alston from Entin's failure to impeach Lightburn regarding this critical area. Lightburn admitted at trial in this case to having committed perjury. Doc. 237 at 34-35. Lightburn did not name Alston but another man as his supplier in his prior testimony. Doc. 237 at 43-44. The government was able to use the taped reference to "Stock Island" to mitigate the harm to its case from Lightburn's admitted perjury and inconsistent

statements. The government repeatedly argued that, even though Lightburn was an admitted perjurer, his taped reference to "Stock Island" meant the jury could believe his claim that he obtained drugs from Alston. Doc. 237 at 151-52, 175-76, 179. Had Entin used the discovery materials available to him to cast doubt on this aspect of Lightburn's testimony as well, there is at least a reasonable probability the outcome of Alston's trial would have been different.

A reasonable jurist would therefore find that the determination that trial counsel's failure to impeach this critical witness was neither deficient performance nor prejudicial to Alston was debatable or wrong.

II. The questions presented are of great public importance because Alston has been deprived of any legal remedy following proceedings marred by multiple substantial deprivations of Alston's constitutional rights.

Alston is serving a mandatory minimum life sentence in prison for a non-violent drug offense following proceedings in which: (1) his counsel admits he erred by failing to preserve a double jeopardy violation; (2) his counsel failed to object to an aggravating role enhancement the government had agreed should not be applied; (3) his counsel's errors resulted in the denial of an adequate *Kastigar* hearing, which denial was not raised on appeal; and (4) his counsel failed to impeach a critical government witness with

available evidence. These errors deprived Alston of his constitutional rights to the effective assistance of counsel, to due process, and against double jeopardy. Yet Alston's claims have never been heard on the merits. His 2255 Petition was denied without an evidentiary hearing and he was deprived of the opportunity to bring an appeal by the district court and Eleventh Circuit's refusal to grant a COA. He has thus been left with no legal remedy for these substantial violations of his constitutional rights.

This outcome is inconsistent with the purpose of the COA requirement. The COA requirement is intended to ensure "differential treatment for those appeals deserving of attention from those that plainly do not." *Miller-El*, 537 U.S. at 337. That is, the COA requirement is meant to act as a filter preventing frivolous appeals from clogging the federal appellate courts. It is not meant to be a shield protecting convictions at all costs, no matter whether they were achieved at the expense of the protections the United States Constitution affords criminal defendants. Yet that is precisely what the COA requirement has done here.

For the constitutional rights afforded to defendants to have real meaning, there must be consistent and effective appellate review of cases such as this one in which there has been a substantial showing that the defendant's constitutional rights were violated. The Court held in *Miller-El* that "issuance of a COA must not be *pro forma* or a matter of course." 537 U.S. at 337. By the same token, however, the

denial of a COA should not be allowed to become *pro forma* or a matter of course or there will be cases like Alston's in which significant deprivations of the defendant's constitutional rights will escape review. The Court should grant the writ of certiorari and hold that Alston cannot be left without any legal remedy for the violation of his constitutional rights.

CONCLUSION

For the reasons set forth above, Petitioner Kenny Alston's petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES E. FELMAN
Florida Bar No. 0775568
KATHERINE EARLE YANES
Florida Bar. No. 0159727
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
Telephone: (813) 229-1118
Facsimile: (813) 221-6750

Counsel for Petitioner

Date: January 11, 2008

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11420-A

KENNY ALSTON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(Filed Oct. 16, 2007)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 05-10108-CIV-MOORE/GARBER
(99-10035-CR-MOORE)

KENNY ALSTON,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent. /

REPORT AND RECOMMENDATION

(Filed Nov. 30, 2006)

THIS CAUSE is before the Court on Movant Kenny Alston's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [CIV-DE 1; CR-DE 311], pursuant to an Order of Reference from the Honorable K. Michael Moore, United States District Judge. For the reasons set forth below, it is respectfully recommended that the Court deny the Motion.

I. BACKGROUND

A. First Trial

On December 15, 1999, a federal grand jury returned an indictment charging Movant Kenny Alston

("Alston") with a single count of possession of cocaine base with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. [CR-DE 13]. On March 6, 2000, Alston proceeded to a jury trial. On the following day, the Court granted Alston's motion for a mistrial on grounds that Williams was previously represented by one of Alston's attorneys and the government intended to call Williams as a witness against Alston. [CR-DE 38].[1]

B. Second Trial

On March 1, 2000, the grand jury returned a superseding indictment against Alston and a co-defendant, Rashawn Williams ("Williams"), charging them both with possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 [CR-DE 28]. The superseding indictment also charged Alston with possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). On August 7, 2000, Alston proceeded to a second jury trial The Court again declared a mistrial on August 10, 2000. [CR-DE 75].

C. Change of Plea

On August 16, 2000, the grand jury returned a second superseding indictment against Alston. [CR-DE

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[1] Prior to trial, Williams pled guilty to the charge against him in the superseding indictment. [CR-DE 43].

71]. This indictment charged Alston with possessing with intent to distribute five grams or more of cocaine base, and an unspecified amount of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. *Id.*

On November 1, 2000, the grand jury returned an eight-count third superseding indictment against Alston, adding a new co-defendant, Jermaine Mathis ("Mathis") [CR-DE 89]. Both defendants were charged with conspiring to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, after previously having been convicted of two drug felonies, in violation of 21 U.S.C. § 846. In addition, Alston alone was charged with possessing with intent to distribute, after previously having been convicted of two drug felonies: five grams or more of cocaine base; 500 grams or more of cocaine; and an unspecified amount of cocaine, all in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

On January 26, 2001, Alston filed a motion to dismiss the third superseding indictment based on double jeopardy grounds. [CR-DE 101]. Alston argued that a retrial of his case should be barred because the government's alleged misconduct had "provoked" the Court to declare a mistrial. On March 7, 2001, the Court denied Alston's motion to dismiss. [CR-DE 118].

On June 18, 2001, Alston pled guilty to all eight (8) counts of the third superseding indictment. [CR-DE 145, 194]. On November 20, 2002, the Court held a sentencing proceeding. During the proceeding, Alston requested to withdraw his guilty plea on

grounds that his attorneys failed to advise him that he would be exposed to the sentencing guideline imprisonment range of 324-405 months. Alston argued that his attorneys had informed him that his sentencing exposure was fifteen years. The Court deferred ruling on Alston's request and invited the parties to submit memoranda on the matter.

On February 14, 2003, Alston filed a motion to withdraw his guilty plea. [CR-DE 199]. Alston argued that his former counsel was ineffective in having "failed to advise Defendant that he would be sentenced as a career offender." On February 27, 2003, the Court granted Alston's motion to withdraw his guilty plea and set the case for trial. [CR-DE 203].

D. Third Trial

On March 26, 2003, the grand jury returned a fourth superseding indictment. [CR-DE 213]. The indictment charged Alston and Mathis with conspiracy to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, in violation of 21 U.S.C. §846. On March 31, 2003, Alston and Mathis proceeded to a jury trial. After three days of trial, the jury found Alston guilty of conspiracy with intent to distribute a controlled substance (Count I). [CR-DE 218]. The jury also delivered a special verdict finding Alston guilty of conspiring with intent to distribute fifty grams or more of cocaine base, and not guilty of conspiring

with intent to distribute five kilograms or more of cocaine.

On June 26, 2004, the Court sentenced Alston to life imprisonment. [CR-DE 245, 26]. Alston appealed [CR-DE 247], and on July 21, 2004, the Eleventh Circuit Court of Appeal affirmed Alston's conviction and sentence. [CR-DE 304]. On October 18, 2005, Alston timely filed the instant motion on grounds of ineffective assistance of counsel.

II. STANDARD OF REVIEW

A. 28 U.S.C. § 2255

Pursuant to 28 U.S.C. § 2255,

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

"[A] collateral challenge, such as a § 2255 motion, may not be a surrogate for a direct appeal." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2003), *cert. denied*, 543 U.S. 891 (2004). "Accordingly, a

non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment . . . unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice." *Id.* at 1232-33. Thus, Alston may not raise claims which were decided against him on direct appeal. *See Hidalgo v. United States,* 138 Fed. Appx. 290, 291 (11th Cir. 2005); *United States v. Nyhuis,* 211 F.3d 1340, 1343 (11th Cir. 2000). Nor may Alston raise claims which he could have raised, but did not raise, on direct appeal unless he can show cause for, and actual prejudice arising from, that procedural default. *See United States v. Frady,* 456 U.S. 152, 167-69, 102 S. Ct. 1584, 1594-95 (1982); *Jones v. United States,* 153 F.3d 1305, 1307-08 (11th Cir. 1998).

B. Ineffective Assistance of Counsel

"[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas,* 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*). The case *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), governs an ineffective assistance of counsel claim. In *Strickland,* the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland,* first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that

counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of fair trial, a trial whose result is reliable. *Id.* Thus, *Strickland* requires proof of both deficient performance and consequent prejudice. *Id.* at 697 ("There is no reason for a court deciding an ineffective assistance of counsel claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). *See also Sims v. Singletary,* 155 F.3d 1297, 1305 (11th Cir. 1998).

As to the deficient performance requirement, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id. Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Even if counsel erred in his legal representation, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Petitioner must demonstrate that the error prejudiced the defense to compel

a finding of ineffective assistance of counsel. *Id.* at 692. To meet this burden, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Strickland cautions that "strategic choices made after thorough investigation of law and facts relevant to plausible opinions are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. A movant cannot meet this burden by simply showing that, in hindsight, the avenue chosen by counsel proves ineffective. The test has nothing to do with what the best lawyers would have done. "We ask only whether some reasonable lawyer at trial could have acted, in the circumstances, as defense counsel acted at trial. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately." *White v. Singletary,* 972 F.2d 1218, 1220-21 (11th Cir. 2000).

III. DISCUSSION

In the instant motion, Alston argues four grounds of ineffective assistance of counsel:

(1) "Mr. Alston was deprived of his constitutional rights against double jeopardy and to the effective assistance of counsel because at the August 7-10, 2000, trial, his counsel, Mitchell Denker failed to clarify that Mr. Alston was not seeking a mistrial and/or failed to ensure that the record reflected that Mr. Alston did not seek a mistrial when the district court *sua sponte* ordered a mistrial";

(2) "Mr. Alston was denied his constitutional right to the effective assistance of counsel because his counsel, Alvin E. Entin, failed to object to the proposed inclusion of an "aggravating role" enhancement at the November 20, 2002, sentencing hearing. . . .";

(3) "Mr. Alston was deprived of his constitutional rights to due process and the effective assistance of counsel because: his counsel, Alvin E. Entin, Esquire, failed to adequately explain to the Court the facts relating to Mr. Alston's entitlement to a *Kastigar* hearing; Mr. Entin failed to correctly state the applicable law relating to the *Kastigar* issue; the government was not required to meet its burden of proof that its evidence was derived from an independent source; and Mr. Entin failed to appeal the denial of an adequate *Kastigar* hearing";

(4) "Mr. Alston was denied his constitutional right to the effective assistance of counsel because his counsel, Alvin E. Dentin [sic], Esquire, failed to impeach a critical government

witness, Charles Lightburn, with available evidence."

Each ground will be discussed in turn.

A. Ground I

Alston's first ineffective assistance of counsel claim is that his attorney failed to object, or state for the record, that he was not requesting a mistrial when the trial judge ordered a mistrial on August 10, 2000. Alston contends that this resulted in the deprivation of his constitutional right against double jeopardy when he was subsequently retried and convicted.

On August 7, 2000, Alston proceeded to trial for the second time. During the trial, Alston's counsel objected to both the government's arguments and evidence. One such objection took place during the government's opening statement where Alston was characterized as the head of a drug family and referred to as "the crack cocaine kingpin here in Key West." [CR-DE 102, at 98-100]. In addition, Alston's counsel objected to the government characterizing one of its witnesses as "one of Kenny's lieutenants." [CR-DE 102, at 102]. Alston's counsel also objected to the government's failure to disclose evidence in its Rule 404(b) notice or in the Court's standing discovery order that was the subject of William's testimony. [CR-DE 103, at 131-39]. The Court sustained these objections and Alston's counsel moved for a mistrial. [CR-DE 103 at 145]. The Court held a hearing on the

mistrial motion the following morning and reserved ruling. [CR-DE 104, at 34].

At the end of the third day of trial, on August 9, 2000, there was an additional discovery violation and Alston's counsel initially moved for mistrial, but then indicated that he would "think about it overnight." [CR-DE 104, at 132-34].

On the morning of August 10, 2000, the government furnished Alston's counsel with evidence that had not been disclosed in discovery. Alston's counsel agreed not to object to evidence regarding transactions that took place on December 7, 1999, or later. The government then proceeded to question a witness about a transaction on December 6, 1999, and Alston's counsel objected. Alston's counsel did not request a mistrial. The Court, however, called a mistrial and discharged the jury. Alston's attorney, Mitchell R. Denker, did not object.

Alston argued on direct appeal that his retrial was barred by the Double Jeopardy Clause where he did not request a mistrial and the government intentionally provoked the mistrial [CV-DE 1, Exh. B, pp. 17-19]. The Eleventh Circuit rejected this argument on appeal Specifically, the Eleventh Circuit held that, "[b]ased on the fact that the district court stated it was granting a mistrial on Appellant's motion and the fact that Appellant's counsel did not contradict the district court, we conclude Appellant at the very least consented to the mistrial. We therefore reject Appellant's double jeopardy argument." [CR-DE 304, p. 7].

The Court has considered Ground I of the instant Motion and finds that Alston has not meet his burden under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). Alston fails to prove that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by his attorney's actions.

In support of his Motion, Alston offers the affidavit of Mitchell R. Denker, his attorney during the August, 2000 trial at issue. In the affidavit, Denker states that, "[t]o the extent that I failed to clarify that Mr. Alston was not seeking a mistrial or failed to ensure that the record reflected that Mr. Alston did not want a mistrial, that omission was a mistake on my part." This statement, though admitting a mistake on the part of counsel, does not conclusively point towards deficient performance. At the time of the trial, a reasonable attorney most likely would not have objected to a mistrial, given the fact that one had already been requested and the possibility of prejudice to the defendant because of the government's multiple discovery violations. *See United States v. Thomas,* 62 F.3d 1332, 1343 (11th Cir. 1995) ("[t]he 'cumulative effect' of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible").

Even assuming that Alston meets the first prong of the *Strickland* test, Alston fails to show that he suffered prejudice and that "but for counsel's unprofessional errors, the result of the proceeding would

have been different." *Strickland,* 446 U.S. at 694. Alston argues that had there not been a mistrial, then he would not have been indicted and convicted of the conspiracy offenses. It is well-established, however, that the Double Jeopardy Clause does not bar multiple prosecutions for substantive offenses on one hand, and conspiracy to commit those offenses on the other hand. *United States v. Felix,* 503 U.S. 378 (1992); *United States v. Eley,* 968 F.2d 1143 (11th Cir. 1992) ("[t]he Supreme Court has made it abundantly clear that whatever evidence is introduced in a trial on a substantive offense, later prosecution for conspiracy based upon the same evidence cannot amount to a double jeopardy violation because the conspiracy and the substantive offense are distinct."). The mistrial at issue was declared during Alston's second trial, where Alston was being tried on a superseding indictment charging him with two counts of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). [CR-DE 28]. Alston was subsequently tried and convicted on a different charge, for conspiracy to possess with intent to distribute cocaine powder and cocaine base. [CR-DE 213].

For the reasons set forth above, Alston's Motion should be denied as to Ground I.[2]

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[2] Pursuant to Local Rule 7.1C, a "reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition. . . ." In his Reply, however, Alston raises for the first time the argument that "[w]hether or not a subsequent indictment of Mr. Alston on conspiracy charges would have been

(Continued on following page)

B. Ground II

Alston asserts that he was denied effective assistance of counsel because his attorney, Alvin E. Entin, failed to object to the proposed inclusion of an aggravating role enhancement at his November 20, 2002 sentencing hearing following his change of plea. Alston claims that, because the government had agreed not to recommend a role adjustment, counsel's failure to object deprived him of the benefit of the plea bargain he had reached with the government.

At the change of plea hearing, the parties announced they had reached a verbal plea agreement. The Court summarized the agreement as follows:

> That was my understanding of what you and the government had agreed upon. Less than 500 grams. There will be no role enhancements, either up or down. There will be an agreed two points off for acceptance of responsibility without prejudice to the defendant's right to argue for a third point at the time of sentencing.

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barred by double jeopardy, such an indictment would be vulnerable on due process grounds. . . ." Alston argues that the government should be required to show its decision to re-indict Alston was not a vindictive decision in violation of due process. This argument is outside of the permissible scope of a Reply. The argument was not raised in the Motion, and the government has not had the opportunity to respond. Accordingly, the Court will not consider this new argument on this Motion.

> The government will not seek 851 enhancement and subject . . . to the possibility of cooperation that would satisfy the requirements and meet the criteria of the U.S. Attorney's Office, it may be that they would file, in the U.S. Attorney's Office sole discretion a 5K1.1 application for some reduction in sentence.

[CR-DE 194, at 3]. The government added that, while neither party would move for an upward or downward departure, probation could do whatever they feel necessary. [CR-DE 194, at 4]. Alston then indicated that he understood and had no questions. *Id.* at 6-7.

On November 20, 2002, the Court conducted a sentencing hearing following movant's change of plea. [CE-DE 196]. The Probation Office computed Alston's score as follows: a base offense level of 34, which was increased to 38 based on Alston's aggravated role in the offense. A two point downward adjustment to 36 was implemented because of Alston's acceptance of responsibility. As a career offender, Alston's criminal history category was VI, resulting in a sentence of 324-405 months. At the sentencing hearing, the Court stated that it would sentence at the low end of this guideline range. *Id.* at 26.

At the sentencing hearing, Alston's counsel claimed to have no knowledge of Alston's prior criminal history. Counsel moved for a downward departure on the basis that the parties had agreed to limit the amount of drugs involved in the offense in order to

achieve a sentence in the fifteen-year range, but that the implication of Alston's career offender status frustrated that intent. The Court declined to award a downward departure on this basis.

Alston's counsel expressed his frustration at the sentencing computation because there was not much difference between the sentence resulting from the guilty plea and if Alston had been convicted at trial The Court did not disagree:

> MR. ENTIN: It's a situation like this that makes me wonder why I enter a plea in a case like this, because I don't really think I could do much more damage to my client if I pled him open or went to trial and got convicted, because ultimately what he saves in this case is nothing. There is virtually no difference.
>
> THE COURT: I don't disagree with you.

Id. Counsel went on to state:

> My personal feeling is that I couldn't have done any worse for this client if I had gone to trial and lost. I don't think there is much practical difference between 324 months and 360 to life. I don't think that had I had the benefit of the knowledge of everything in Mr. Alton's [sic] past that shows up in this PSI that I would have ever advised him to take a plea that would have subjected him to this.

Id. at 28.

The Court indicated if Alston believed that by limiting the amount of cocaine involved he would be sentenced to fifteen years, the Court would allow him to withdraw his guilty plea. Alston's counsel then filed a motion to withdraw Alston's guilty plea, which motion was granted. [CR-DE 199, 203]. The Court vacated Alston's guilty plea and set the case for trial.

In response to the instant motion, the government argues that counsel's conduct was not deficient for failing to object to the proposed inclusion of an aggravating role enhancement. The government argues that even if counsel's performance was deficient, Alston was not prejudiced thereby. The government claims that the record demonstrates that, even if counsel had successfully objected to the role enhancement, Alston still would have withdrawn his guilty plea and gone to trial. In support of this argument, the government claims that there was not much difference between the sentencing resulting from the guilty plea and the sentence if Alston had been convicted at trial.

The government also identifies that Alston's guideline range with the aggravating role enhancement, as calculated at the sentencing hearing, was 324-405 months. The government argues that without an aggravating role enhancement, Alston's guideline range as a career offender would have been 292-365 months.

In *Hill v. Lockhart,* 474 U.S. 52 (1985), the United States Supreme Court held that "the two-part

test enunciated in *Strickland* applies to challenges to guilty pleas based on ineffective assistance of counsel." According to the Court in *Hill,* a defendant must also show that "counsel's constitutionally ineffective performance affected the outcome of the plea process." The Eleventh Circuit has applied this standard to defendants who claim that they would have pled guilty but for counsel's alleged errors. *Coulter v. Herring,* 60 F.3d 1499, 1503-04 (11th Cir. 1995).

The Court finds that Alston has failed to establish that counsel was ineffective as claimed. Alston has failed to demonstrate that counsel's performance was deficient and that he was prejudiced thereby. Alston has not shown a reasonable probability that, but for counsel's alleged errors, the results would have been different.

For the foregoing reasons, Alston's Motion should be denied as to Ground II.

C. Ground III

Alston argues that his trial counsel was ineffective for failing to adequately argue the legal issue under *United States v. Kastigar,* 406 U.S. 441 (1972), and for failure to raise the issue on direct appeal.

According to Alston, following his entry of a guilty plea, he cooperated with the government, met with the government on at least six occasions, and was debriefed extensively. Alston then withdrew his plea and proceeded to trial. Alston claims that in the

course of his cooperation, he led the government to at least two of the witnesses who testified at trial, Abigail Ashe and Darrell Waldon.

Prior to trial, Alston's counsel filed a motion for a hearing pursuant to *Kastigar,* in which he argued that the evidence the government proposed to use against Alston was tainted by the use or derivative use of statements Alston made in the course of his cooperation with the government [CR-DE 204]. The Court held a *Kastigar* hearing on the morning of the first day of trial. Alston's counsel argued that the government should be prohibited from using any evidence derived directly or indirectly from statements Alston made in the course of his cooperation. [CR-DE 235]. Alston's counsel also argued that the burden should be on the government to prove that the evidence it proposed to use at trial had an independent source. [CR-DE 235].

Alston argues that his counsel failed to explain to the Court the changes in the government's theory and evidence, between Alston's prior trial and the trial at issue here. Alston claims that there were significant changes in the government's theories and evidence between the two trials, and that "the prior trial did little to show an independent source for the evidence the government put on at this trial." Further, Alston contends that "[b]ecause the case was reassigned to a new judge before the trial at issue, the Court was left with the misimpression it expressed, that the prior trial established the "independent or non-derivative nature of [the government's] evidence." [CR-DE 235,

at 9]. Alston argues that his counsel "not only failed to correct his misimpression, but also told the Court that it should not be difficult for the government to establish an independent source for its evidence 'because they have tried the basic part of this case once before.'" [CR-DE 311, 235].

Alston also argues that his counsel failed to correctly state the applicable law at the *Kastigar* hearing. Specifically, Alston takes issue with counsel's statement that the Eleventh Circuit has not held that *Kastigar* protections apply "under a Rule 11 plea colloquy," but that other circuits had. [CR-DE 235]. Alston claims that having been incorrectly informed that the Eleventh Circuit does not require the government to make a *Kastigar* showing in plea cases, the Court did not require the government to establish an independent, legitimate source for its evidence.

The government argues that at the *Kastigar* hearing, it represented that it had learned about Ashe in the previous trial, where she was a rebuttal witness. *Id.* at 10. The government claimed that it did not remember hearing anything about Ashe from Alston, but that the government decided to speak with Ashe after her sister, Elizabeth, told the government that Ashe used to live at the C-9 trailer. *Id.* at 11-12. The government also showed the Court the debriefing notes from its meeting with Alston to establish that Ashe was not discussed. *Id.* at 12-13. The Court determined that the testimony of Abigail Ashe was not tainted. *Id.* at 14.

At the *Kastigar* hearing, Alston's counsel also argued that Darrell Waldon's testimony was tainted because Alston had enabled the government to obtain documents in Waldon's possession, such as a lease agreement. *Id.* at 15. Counsel argued that Waldon met with the former prosecutor at Alston's request to provide her with the lease. The government responded by stating that it had received a copy of the lease from co-defendant Mathis' counsel during discovery in the first trial. *Id.* The Court ruled that the testimony of Darrell Waldon was not tainted. *Id.* at 16.

Thus, the Court considered Alston's arguments at the *Kastigar* hearing before trial. Alston has failed to establish that counsel's alleged failures, as detailed above, constituted deficient performance. Nor has Alston established any prejudice resulting from counsel's alleged deficient performance. Alston has not shown a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

For the reasons set forth above, Alston's Motion should be denied as to Ground III.

D. Ground IV

Alston argues that his counsel was ineffective for failing to impeach a critical government witness, Charles Lightburn, with available evidence. Alston provides the following background in support of this argument. Alston was tried with co-defendant

Jermaine Mathis from March 31 through April 2, 2004. Both Alston and Mathis were charged with conspiracy to possess with intent to distribute cocaine and crack cocaine. The government's theory at trial was that Alston, Mathis and others used a trailer, referred to at trial as the "C9 trailer," to "cook" crack cocaine and to store and distribute cocaine and crack cocaine. Darrell Waldon owned the C9 trailer. Mathis and another man leased the trailer from Waldon. The investigation that led law enforcement to C9 was conducted by a "Mobile Enforcement Team" ("MET") of the Drug Enforcement Administration. The MET engaged in taped undercover transactions with, among others, suspected drug dealer Charles Lightburn. The MET also conducted surveillance on the C9 trailer. Cocaine, crack cocaine, and marijuana were found in Mathis' bedroom in the trailer.

Alston states that at trial the government played the audiotape of a July 12, 1999, conversation between Lightburn and a confidential source, in which they discussed a prior sale that the confidential source claimed was "short." Alston states that on the tape, Lightburn blamed the problems on "Kenny." Lightburn then testified that the "Kenny" he referred to was Alston.

In addition, Alston states that the government played the audiotape of a July 18, 1999, conversation between Lightburn, the confidential source, and an undercover agent, in which Lightburn told the confidential source to call back in thirty minutes because he "gotta go to Stock Island then, you know, grab that

shit." Alston states that was followed by a telephone conversation in which Lightburn told the confidential source he wouldn't be able to obtain anything until the next day.

Alston claims there was evidence available to Alston's counsel which could have been used to impeach Lightburn and to call into question Lightburn's testimony that his reference to "Stock Island" meant obtaining drugs from Alston. Alston has attached to his Motion documentation of an audiotaped drug sale by Lightburn on July 19, 1999. That documentation shows that Lightburn was driven to the July 19, 1999 meeting by an unidentified black male in a car registered to James Leland and Doris L. Robertson. At the July 19, 1999 meeting, Lightburn sold the confidential source a quantity of crack cocaine.

Alston argues that counsel should have asked Lightburn about his association with Mr. Leland. Alston claims that "Mr. Entin [ ] had evidence available to him showing that one day after Mr. Lightburn promised to get drugs from 'Stock Island' and deliver them the following day, Mr. Lightburn was driven to the meeting at which he consummated that sale by a known drug dealer who lived on Stock Island. Mr. Entin made no use of that evidence."

Alston concedes that "Mr. Lightburn's testimony was otherwise significantly impeached." The government argues that in spite of the fact that Lightburn's testimony was significantly impeached, there was

sufficient testimony by other witnesses which corroborated his testimony about Alston and independently established that Alston participated in a conspiracy to possess with intent to distribute cocaine. For example, Danny Graz, who supplied drugs to the conspirators, testified that Lightburn was a runner for Mathis and Alston. [CR-DE 236, at 43-44], and Jason Bervaldi and Graz both testified that they sold cocaine to Mathis because they did not trust Alston. *Id.* at 14-15, 39-40, 44-45. Bervaldi testified that, among things, he had witnessed Alston cook cocaine on one occasion, *id.* at 46, and Alston handed Mathis a brown paper bag containing the purchase money while the cocaine was in plain sight on Mathis' bed. *Id.* at 53, 55-56. Solomon Scott also testified that he had seen drugs in the C9 trailer, and had witnessed Alston cook drugs in the kitchen. *Id.* at 140-41, 149. Rashawn Williams testified that, among other things, she sold cocaine for Alston during their relationship, had purchased drugs with Alston's money, and Alston brought the drugs to the C9 trailer. *Id.* At 73, 78, 92-93, 111, 1115.

The Court finds that Alston has failed to demonstrate a reasonable probability that the result of the trial would have been different had counsel further impeached Lightburn. Alston has failed to establish that counsel's performance was deficient or that he was prejudiced by counsel's alleged deficiency.

For the reasons set forth above, Alston's Petition should be denied as to Ground IV.

IV. CONCLUSION

For the foregoing reasons, it is respectfully RECOMMENDED that the Court DENY Movant Kenny Alston's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [CIV-DE 1; CR-DE 311].

The parties have ten days from the date of this Report and Recommendation to file written objections, if any, with the Honorable K. Michael Moore, United States District Judge. *See* 28 U.S.C. § 636(b)(1)(c). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dagger,* 847 F.2d 745, 750 (11th Cir. 1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida, this 30th day of November, 2006.

/s/ Barry L. Garber
BARRY L. GARBER
UNITED STATES
MAGISTRATE JUDGE

Copies supplied to:
United States District Judge Moore
Counsel of record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 05-10108-CIV-MOORE/GARBER
99-10035-CR-MOORE

KENNY ALSTON,

Movant,

vs.

UNITED STATES
OF AMERICA,

Respondent. /

OMNIBUS ORDER GRANTING MOVANT'S MOTION FOR EXTENSION OF TIME *NUNC PRO TUNC* TO FILE OBJECTIONS (DE #16), ADOPTING MAGISTRATE'S REPORT (DE #15) AND DENYING MOVANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE (DE #1)

(Filed Jan. 17, 2007)

THIS CAUSE came before the Court upon Movant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (DE #1).

THIS MATTER was referred to the Honorable Barry L. Garber, United States Magistrate Judge. Magistrate Judge Garber issued a Report and Recommendation (DE #15), recommending that Movant's Motion to Vacate, Set Aside or Correct Sentence

Pursuant to 28 U.S.C. § 2255 (DE #1) be denied. Movant filed a Motion *Nunc Pro Tunc* for Extension of Time to File Objections (DE #16) and then subsequently filed Objections to the Magistrate's Report and Recommendation (DE #323 in Case No. 99-10035-CR-MOORE). It is hereby

ORDERED AND ADJUDGED that Movant's Motion *Nunc Pro Tunc* for Extension of Time to File Objections (DE #16) is GRANTED.

After a *de novo* review of the record, including Movant's Objections, it is

ORDERED AND ADJUDGED that Magistrate Judge Garber's Report (DE #15) is ADOPTED. Accordingly, it is

ORDERED AND ADJUDGED that Movant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (DE #1) is DENIED. It is therefore

ORDERED AND ADJUDGED that the Clerk of Court is directed to CLOSE this case. All pending motions not yet ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of January, 2007.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES
MAGISTRATE JUDGE

c:

All counsel of record

U.S. Magistrate Judge Barry L. Garber

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 05-10108-CIV-MOORE/GARBER
99-10035-CR-MOORE

KENNY ALSTON,

Movant,

vs.

UNITED STATES
OF AMERICA,

Respondent. /

ORDER DENYING MOVANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY (DE # 26) AND DENYING MOVANT'S MOTION FOR RECONSIDERATION (DE # 23)

(Entered Mar. 29, 2007)

THIS MATTER is before the Court upon Movant's Request for Certificate of Appealability (DE #26) and Movant's Motion for Reconsideration (DE #23).

A prisoner appealing denial of a petition brought under 28 U.S.C. § 2255 must first obtain a Certificate of Appealability. *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). A Certificate of Appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right" 28 U.S.C. § 2253(c)(2). After a review of the record, the Court

finds that Petitioner has not raised an issue regarding the denial of a constitutional right which could be debatable among reasonable jurists, or is otherwise reasonably adequate to warrant further proceedings. *Miller-El,* 537 U.S. at 327, 336-38.

The Petitioner argues in his Motion for Reconsideration (DE # 23) that Reconsideration should be granted because the Court did not hold an evidentiary hearing. However, the legal standard quoted by the Petitioner indicates that no hearing is required if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255. After a review of the record, the Court finds that the motion, files, and records of this case conclusively show that the prisoner is entitled to no relief, and that the Petitioner's Motion for Reconsideration raises no issues or arguments making appropriate further reconsideration of the Order Adopting the Report and Recommendation (DE # 22). Accordingly it is,

ORDERED AND ADJUDGED that Movant's Request for Certificate of Appealability (DE # 26) is DENIED. It is further

ORDERED AND ADJUDGED that Movant's Motion for Reconsideration (DE # 23) is DENIED. This case is to remain CLOSED. All other pending motions are DENIED AS MOOT.

DONE and ORDERED in Chambers at Miami, Florida, this 29th day of March, 2007.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES
MAGISTRATE JUDGE

cc: All Counsel of Record
U.S. Magistrate Judge Barry L. Garber

APPENDIX E

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13496

D.C. Docket No. 99-10035-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNY ALSTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(JULY 21, 2004)

Before BLACK and MARCUS, Circuit Judges, and SMITH*, District Judge.

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* Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation.

PER CURIAM:

Appellant Kenny Alston was convicted after a jury trial of conspiracy to possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 & 841(b)(1)(A).[1] Appellant was sentenced to life imprisonment.

I. BACKGROUND

In July 1999, the DEA was investigating Appellant and codefendant Jermaine Mathis as known drug traffickers in Key West, Florida. Mathis was primarily responsible for obtaining the cocaine powder that he and Appellant cooked into crack. Between 1995 and 1999, Mathis obtained cocaine powder from Danny Graz, with transactions peaking at about four kilograms per month. Jason Bevaldi was another of Mathis's suppliers.

On July 22, 1999, DEA Agent McCarthy, acting undercover, purchased approximately one ounce of crack cocaine from Charles Lightburn. Appellant accompanied Lightburn during the sale. Lightburn

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[1] The judgment states Alston was convicted of conspiracy to possess with intent to distribute less than 5 kilograms of cocaine and 50 grams or more of cocaine base. The verdict form, however, states the jury found Alston guilty as to 50 grams or more of cocaine base, but not guilty as to 5 kilograms or more of cocaine. There was no reference on the verdict form to less than 5 kilograms of cocaine. We remand the case for the sole purpose of permitting the district court to amend the judgment against Alston to reflect accurately the offense of conviction.

had obtained the crack from Appellant. Lightburn had known Appellant since 1995 and distributed crack cocaine for him between 1995 and 1999. Lightburn had on occasion received crack cocaine from Appellant at Appellant's residence, a trailer at C9 9th Avenue, Stock Island, Florida. Moreover, on several occasions, Lightburn had seen Appellant and Mathis cooking crack cocaine at the trailer.

On November 5, 1999, agents executed a search warrant at Appellant's trailer. Mathis was arrested in one of the bedrooms, from which agents seized approximately one kilogram of crack cocaine and 10 pounds of marijuana. Agents also seized 35 milligrams of crack cocaine from the kitchen, as well as other drugs and drug paraphernalia used in the manufacture of crack cocaine. Appellant subsequently was arrested and indicted on a drug charge.

On March 6, 2000, Appellant's first jury trial began.[2] On that same day, the Government provided its witness list, including as a witness codefendant Rashawn Williams who had pled guilty and who had been represented by Appellant's trial attorney. On March 7, 2000, Appellant requested a mistrial on the grounds that one of his attorneys (the one who had represented Williams) would be needed as a witness to rebut Williams' expected testimony. The district court ordered a mistrial.

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[2] Just prior to trial, a superseding indictment was issued.

On August 7, 2000, Appellant's second jury trial began. During the course of the trial, Appellant moved for a mistrial on the grounds that the Government failed to provide required discovery. The court initially deferred ruling on the motion, but subsequently ordered a mistrial.

In November 2000, a grand jury returned a third superseding indictment against Appellant.[3] Appellant moved for dismissal of the indictment on the basis of double jeopardy due to the mistrial in his second trial. The district court denied Appellant's motion.

On June 18, 2001, Alston pled guilty to all eight counts of the third superseding indictment. In November 2002, Appellant requested that he be permitted to withdraw his guilty plea. The district court deferred ruling on the request and invited the parties to submit briefs on the matter. In January 2003, the district court judge transferred the case to another judge. On February 14, 2003, Appellant formally filed a motion to withdraw his guilty plea, contending he had received ineffective assistance of counsel. The district court granted Appellant's motion and set the case for trial.

On March 26, 2003, the grand jury returned a fourth superseding indictment, charging Appellant and codefendant Mathis with one count of conspiring

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[3] A second superseding indictment had been issued on August 16, 2000.

to possess with intent to distribute and to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 & 841. On March 31, 2003, Appellant and Mathis went to trial. The jury did not reach a verdict as to Mathis, but found Appellant guilty, delivering a special verdict finding Appellant guilty of conspiracy to posses with intent to distribute 50 grams or more of cocaine base, but not guilty of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. The district court imposed a statutory mandatory sentence of life imprisonment.

II. DISCUSSION

Alston challenges his conviction, arguing his retrial was barred by the Double Jeopardy Clause and the district court erred by refusing to sever his trial from that of codefendant Mathis. Alston also challenges his sentence. He contends the district court did not use the correct drug quantities in determining his sentence.

A. Double Jeopardy

As set out above, Appellant filed a motion to dismiss the third superseding indictment against him on the basis of double jeopardy. He argued the Government's prosecution could not be maintained after the district court's order of a mistrial at his second trial.

The Double Jeopardy Clause ordinarily "does not bar retrial after the grant of a mistrial upon the defendant's motion." *United States v. Fern,* 155 F.3d 1318, 1324 (11th Cir. 1998) (citation omitted).[4] However, where a trial judge declares a mistrial without the consent of the defendant, the government avoids the double jeopardy bar only if the judge determined that a mistrial was a manifest necessity. *United States v. Bradley,* 905 F.2d 1482, 1486 (11th Cir. 1990).

Upon review of the record, it is evident that, at his second trial, Appellant moved for a mistrial based on discovery violations on at least one occasion. The district court initially deferred ruling on the motion. R7 at 145, 156-58; R8 at 34. When Appellant subsequently objected again on discovery grounds to the Government's attempt to present evidence of his prior drug involvement, the district court ordered a mistrial, stating:

> So in any event it seems to me that rather than getting into further analysis of the discovery whether there has or has not been discovery, I think we could and should consider this at least the third motion for mistrial, and without finding that it is anybody's

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[4] If, however, the prosecution intentionally goads the defendant into moving for a mistrial, the Double Jeopardy Clause does bar retrial. *Fern*, 155 F.3d at 1324. This Court has "suggested that goading may be found where the conduct of the government in bringing about the original mistrial is due to 'gross negligence or intentional misconduct.'" *Id.* at n.7 (citation omitted). No such conduct occurred here.

> fault, it is just that there is enough confusion about all of this that I cannot and choose not to make findings on because I just don't want to get into judging the credibility of what I know to be fine lawyers who are acting sincerely and doing the best they can.
>
> So I am going to grant the motion for mistrial, discharge the jury.

R9 at 34. At no point did Appellant state he was not moving for a mistrial. Moreover, it appears the district court granted the mistrial on the grounds on which Appellant had moved earlier – the Government's failure to provide required discovery.

Based on the fact that the district court stated it was granting a mistrial on Appellant's motion and the fact that Appellant's counsel did not contradict the district court, we conclude Appellant at the very least consented to the mistrial. We therefore reject Appellant's double jeopardy argument.

B. Severance

Appellant argues his case should have been severed from that of codefendant Mathis because they presented mutually antagonistic defenses. In particular, Appellant points out that Mathis's defense implicated Appellant.

This Court reviews a district court's denial of a motion for severance for abuse of discretion. *United States v. Talley*, 108 F.3d 277, 279 (11th Cir. 1997) (citation omitted).

In *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933 (1993), the Supreme Court addressed the issue of severance in the context of mutually antagonistic defenses and concluded:

> Mutually antagonistic defenses are not prejudicial *per se*. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.
>
> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

Id. at 538-39, 113 S. Ct. at 938 (citations omitted).

Alston contends he was prejudiced by the district court's refusal to grant a severance in that he and codefendant Mathis presented "violently conflicting defenses." We note that Alston did not present a defense. As for Alston's contention that Mathis essentially operated as a second prosecutor, Mathis did ask questions on cross examination that suggested unlawful conduct by Alston and did present testimony in his defense case from a witness to the effect that Alston and not Mathis had been involved in drug dealing. Applying the standard set out in *Zafiro*, however, we conclude there was no reversible error.

Alston has not shown that one of his specific trial rights was compromised. He had the opportunity to conduct his own examination of the witnesses. Moreover, he does not contend the joint trial prevented him from obtaining and presenting any exculpatory evidence he would have been able to obtain or present in a severed trial. *See id.* at 539, 113 S. Ct. at 938. Nor does he contend the witness testimony Mathis presented during his defense case would have been inadmissible if presented by the Government in a severed trial. *See id.* Furthermore, any risk of prejudice from the joint trial was alleviated by the district court's instructions to the jury. The district court instructed the jury to consider the counts separately and the evidence against each defendant separately. *See id.* at 541, 113 S. Ct. at 939.

Alston also has not shown the jury was prevented by the joint trial from making a reliable judgment about guilt or innocence. The danger suggested by Alston's argument is that the jury would believe Mathis's defense. If it believed Mathis's defense, the jury would have found Alston guilty and Mathis not guilty. That is not, however, what happened here. The jury did find Alston guilty, but was unable to reach a verdict as to Mathis. Thus, applying *Zafiro,* we conclude Alston is not entitled to relief.

C. Drug Quantity

The conspiracy with which Appellant was charged was alleged to have involved 5 kilograms or

more of cocaine and 50 grams or more of cocaine base. Appellant essentially contends that, since the jury found him guilty only as to 50 grams or more of cocaine base, the district court erred by considering 4.6 kilograms of cocaine in determining his sentence.

Appellant did not raise this objection at sentencing. We therefore review for plain error only. *United States v. Neely*, 979 F.2d 1522, 1523 (11th Cir. 1992).

Appellant was subject to a statutory mandatory life sentence due to his two prior drug convictions. Accordingly, the district court did not err in sentencing Alston.

III. CONCLUSION

The Government's prosecution of Alston in this case was not barred by double jeopardy. Moreover, the district court did not err in refusing to sever Alston's case from that of codefendant Mathis or in sentencing Alston.

AFFIRMED AND REMANDED.